

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY M. KIPEN and DEPARTMENT OF THE NAVY,
NAVAL FACILITIES ENGINEERING COMMAND, Jacksonville, FL

*Docket No. 02-694; Submitted on the Record;
Issued October 8, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded the acceptance of appellant's claim.

This case has been before the Board previously. By decision dated December 22, 1999, the Board remanded the case to the Office, finding that a conflict in the medical opinion evidence existed between Board-certified pulmonologists, Dr. Sean Muldoon, who provided a second-opinion evaluation for the Office and appellant's treating physician, Dr. Isabella K. Sharpe, regarding whether appellant sustained employment-related asbestosis and asbestos-related pleural disease.¹ The law and facts as set forth in the previous Board decision are incorporated herein by reference.

Subsequent to the Board's December 22, 1999 decision, by decision dated November 24, 2000, the Office found that appellant was not entitled to wage-loss compensation because he had been terminated for cause. Appellant timely requested a hearing and, in a decision dated January 28, 2001 and finalized January 29, 2001, an Office hearing representative found that termination for cause did not serve as a bar to the receipt of compensation benefits and remanded the case to secure an impartial medical evaluation.

By letter dated August 3, 2001, the Office referred appellant, along with the medical record, a set of questions and an updated statement of accepted facts, to Dr. Steven Krawtz, a Board-certified pulmonologist, for a second-opinion evaluation. In a report dated August 31, 2001, Dr. Krawtz advised that appellant had no employment-related pulmonary disability, specifically advising that he did not have asbestos-related lung or pleural disease.

On November 7, 2001 the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. Eugene Ryerson, a Board-certified

¹ Docket No. 98-1027.

pulmonologist, for an independent medical evaluation. In a report dated December 6, 2001, Dr. Ryerson stated that, while appellant could have chronic bronchitis due to his long history of smoking, he did not have asbestosis or pulmonary fibrosis, based on his examination which included high resolution computerized tomography. He noted that appellant's pulmonary function tests demonstrated inconsistent patient effort but were still within normal limits and concluded that he had no impairment due to asbestosis and was not totally disabled. In an attached functional capacity examination, Dr. Ryerson advised that appellant had no limitations and that there was no reason that he could not work.

By decision dated January 2, 2001, the Office rescinded the acceptance of appellant's claim that he sustained employment-related asbestosis and asbestosis-related pleural disease and, therefore, found that he had no work-related disability. The instant appeal follows.

The Board finds that the Office properly rescinded acceptance of appellant's claim.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation benefits. This holds true where as here, the Office later decides that it erroneously accepted the claim. To justify rescission of a claim the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument or rationale.²

Causal relationship is a medical issue³ and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵ Here the Office determined that a conflict of medical opinion existed between appellant's treating physician Dr. Isabelle K. Sharpe and Drs. Sean Muldoon and Krawtz, who provided second opinions for the Office. The Office then referred appellant, along with the medical record, a statement of accepted facts and a list of questions, to Dr. Ryerson, to resolve the conflict. In his report dated December 6, 2001, which was based on examination and objective testing, Dr. Ryerson specifically advised that appellant did not have any asbestosis-related lung or pleural disease and no employment-related disability.

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁴ *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

In this case, the Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Ryerson, the referee examiner, who advised that appellant did not have asbestosis or asbestos-related pleural disease. As this consists of new evidence, the Board finds that the Office's rescission of appellant's claim was proper.

The decision of the Office of Workers' Compensation Programs dated January 2, 2002 is hereby affirmed.

Dated, Washington, DC
October 8, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member